

EMPLOYMENT LAW 2019 REVIEW: ANOTHER YEAR OVER...

16 December 2019

Yet another year dominated by what seems to be the alternative reality of Brexitland. We started the year with Theresa May as Prime Minister, then in came Boris Johnson over the summer, two missed exit dates and finishing the year with an "oh not another one" General Election.

For now, we leave the political uncertainty aside (well as best we can) and instead reflect on our pick of the most memorable 2019 employment cases and developments.

1. **Employment Status**: The taX Factor
2. **TUPE**: The Tatupe Fixer; Just Tatupe of Us
3. **Whistleblowing**: Master behind the Chef; Master Chef: the Profession; The Great British Broad Menu
4. **Trade unions**: Deal or no deal; Strike it Unlucky
5. **Post termination clause**: Strictly Come Drafting
6. **Discipline**: Stacey Duly Investigates; Suspension Watch; Pan-or-ram-on
7. **Dismissal**: The Only Way is Exit
8. **Privacy**: Big Brother; The Voice secretly recorded
9. **Data Protection**: First Dates;
10. **Legal privilege**: Don't tell the Judge; Grand Designs go awry
11. **Working Time**: Extra pay on the Beach; The Great British Break Off; The Great British Break Off: an extra slice
12. **Family Friendly**: Pay Sync Battle; Who Dare Wins
13. **Equal Pay**: Supermarket Sweep
14. **Harassment**: Under(third party)cover Boss
15. **Discrimination**: The Coffey Maze; Spitting Material Image; The Frosty Medical Report; The Weakish Link; Mastermind; Only Connect to company policy; The Real

1. Employment Status

The *taX* Factor

Determining worker status in modern workplaces continued to be a hot topic in 2019. Just how do you decide if an individual is an employee or a worker or self-employed when determining employment rights? And how does that fit with employed or self-employed status for tax purposes?

Preparations for the final Supreme Court showdown in the high profile Uber drivers' status dispute have taken some time, so rather than a 2019 hearing, we need to wait until July 2020. We also still await the outcome of the 2018 BEIS and HMRC joint consultation on employment status.

The 2019 employment status hot topic has been IR35 off payroll working. Existing public sector restrictions and rules on IR35 (workers providing services through intermediaries) were announced to be extended to medium and large private sector organisations from 6 April 2020. Under the controversial change, instead of the contractor having responsibility for determining their employment status for tax purposes, the client or hirer will need to make that call. The hirer could be liable for any missing tax if they get the decision wrong. As a result some well-known large employers have announced they are ending contracting with individuals via that individual's Personal Services Company (PSC).

Illustrating just how hard it is to get the tax status correct, 2019 has seen a number of IR35 employment status cases being pursued by HMRC against individuals with mixed results as each case is very fact specific.

Cases in which deemed employee status has been held include:

- Paya Limited and others v HMRC (BBC presenters);
- Christa Ackroyd Media Ltd v HMRC (BBC presenter);
- Big Bad Wolff Limited v HMRC (actor).

Cases in which self-employment status has been held include:

- Albatel Limited v HMRC (Lorraine Kelly)

- Atholl House Productions v HMRC (BBC presenter)
- Canal Street Products Ltd v HMRC (ITV presenter)
- RALC Consulting Ltd v HMRC (IT consultant)
- Kickabout Productions Ltd v HMRC (radio presenter)

The case of *George Mantides Ltd v The Commissioners for Her Majesty's Revenue & Customs* provides an interesting illustration of the complexities of the issue. It concerned the supply of services of an urologist under separate contracts to two different hospitals. While the same individual was providing essentially the same services, the set up and operation of the different contracts resulted in different outcomes.

Controversy on just how hard it is to get the tax status call right led to the Conservative, Labour and Liberal Democrat parties announcing that they would review the planned 6 April 2020 changes if elected. Will the change be delayed or even scrapped? HMRC believe many individuals operating through PSCs are not paying the correct tax and estimate the change in enforcement will bring £3.1 billion in additional revenue for the Exchequer between 2020 and 2024. Will the lure of significant additional tax revenue be too great for the new Government to forego?

2. TUPE

The Tatupe Fixer

It is sometimes forgotten that the definition of "employee" under Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is different to the definition used in the Employment Rights Act 1996 (ERA). This year in *Dewhurst v Revisecatch Ltd (t/a Ecourier)* and *City Sprint*, an employment tribunal held, at a preliminary hearing, that the definition of employee under TUPE is wide enough to cover not only "employees" as defined under s230(3)(a) ERA but also "workers" under s 230(3)(b) ERA.

Three cycle couriers were engaged by City Sprint until it lost its contract to Ecourier. Ecourier then engaged the claimants after that point. The cycle couriers claimed holiday pay under the Working Time Regulations 1998 and failure to inform and consult under TUPE. The tribunal held that so-called "limb (b) workers" are within the definition of employee under TUPE and only independent contractors genuinely in business on their own account are excluded. Although only a non-binding first-instance judgment, it is highly significant as there is no appeal level decision on this point and the practical risks and liabilities for employers are potentially significant. Subject to a future appeal, TUPE to the

rescue!

Just Tatupe of Us

Also from this year's case law on transfers we have learned:

1. The duty under the National Minimum Wage Act 1998 (NMWA) to maintain wage records transfers to the transferee on a relevant transfer falling within the meaning of TUPE 2006 and therefore the transferor employer will no longer be required to maintain such wage records and will not be required to comply with any production notice. Accordingly, a transferee should ensure that all records maintained by the transferor for the purposes of NMWA are delivered to it (*Mears Homecare Limited v Bradburn*).
2. On an employer's insolvency, arrears of equal pay can be claimed from the National Insurance Fund up to the eight weeks' limit (and subject to the maximum weekly pay cap). Liability for any excess passes to the transferee. One for purchasers of an insolvent business to be aware of (*Graysons Restaurants Ltd v Jones and others*).
3. Dismissal ostensibly for a dysfunctional working relationship may be TUPE-related. When ascertaining the principal reason for the dismissal, while proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour. In this case, a poor working relationship between two transferring employees had existed for several years. The inference that the transfer rather than the poor relationship in isolation from the transfer was the principal reason for the dismissal was therefore "very strong" (*Hare Wines Ltd v Kaur and anor*).
4. There can be a business transfer where a production unit is hived off but remains within a business and relies on other parts of the business for the factors of production. The Court of Justice of the European Union gave guidance on the features necessary for the production unit to retain its identity. For the EU rules on business transfers (and TUPE) to apply, a hived-off unit must not be dependent on unilateral decisions of third parties. It must have sufficient safeguards, such as agreements with those third parties to enable it to function on its own post-transfer. (*Ellinika Nafpigeia v Panagiotis Anagnostopoulos and ors*).

3. Whistleblowing

Master *behind* the Chef

Where an employee is dismissed, it will be automatically unfair if the principal reason for the decision to dismiss was that they made a protected public interest disclosure. But what if the decision-maker is being manipulated by another? In the case of *Royal Mail Ltd v Jhuti*, the dismissing officer was unwittingly misled by the employee's line manager.

In 2017, the Court of Appeal held that it is only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss that are relevant. However, in one of the 'must read' judgments of the year, the Supreme Court has unanimously confirmed that an employer is liable for the reasons of any manipulator in the "hierarchy of responsibility above the employee" even where that reason is hidden from the decision-maker(s). The improper actions or motive of a line manager will therefore be attributed to the employer. In other words, if a line manager determines that he or she should be dismissed for one reason, but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden (unfair) reason rather than the invented reason.

Master Chef: the *Profession*

For a disclosure to be a qualifying disclosure under the whistleblowing legislative provisions, the worker must have:

- a reasonable belief that the information disclosed tends to show one of the six potential 'relevant failures' (including a 'breach of any legal obligation') has occurred, is occurring, or is likely to occur; **and**
- (since 2013) a reasonable belief that 'it is made in the public interest'.

This year, we have further examples indicating that the bar to establish reasonable belief is set low.

In *Ibrahim v HCA International Ltd* (disclosures of alleged defamation of the worker), the Court of Appeal reminds us that while the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be their predominant motive for making it. It is possible for a disclosure motivated by personal self-interest to nevertheless still also to be made in the "public interest".

Also *Elysium Healthcare No 2 Ltd v Ogunlami* (disclosure of supervisor taking patient's uneaten food in breach of company policy) suggests a liberal approach will be taken to establishing a breach of a legal obligation. In this case, the disclosure pointed to breach of a company policy. The Employment Appeal Tribunal (EAT) did not consider it essential for

the whistleblower to show that they believed the relevant company policy itself was part of the employment contract of the alleged wrong-doer when pointing to breach of their employment contract as being the relevant 'breach of a legal obligation'.

The Great British *Broad* Menu

The menu of 'workers' protected under the whistleblowing legislation is broad and includes, among others, agency workers, freelance workers, seconded workers, homeworkers and trainees, non-executive directors, as well as employees. This year we have also had judgments confirming:

- Judges as office-holders are entitled to whistleblowing protection under the Employment Rights Act 1996 via the Human Rights Acts 1998. This judgment leaves the door open for other office-holders to also claim protection (*Gilham v Ministry of Justice*).
- On our list of 'highly notable employment tribunal judgments of 2019', is *Bilsbrough v Berry Marketing Services Ltd*. The tribunal has extended the boundaries of the whistleblowing protection in order to protect from detrimental treatment not only workers who have made protected disclosures, but in some cases those who are merely considering or preparing to do so. Although only a non-binding first-instance judgment, this decision is carefully reasoned and likely to be followed in future cases.

When answering who is protected under the whistleblowing legislative provisions, it is safest to assume pretty much everyone!

4. Trade unions

Deal or No Deal

Under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992, employers are prohibited from making offers to employees with the sole or main purpose of undermining collective bargaining by the union (the prohibited result).

But just how wide is the scope of section 145B? When can lawful variation tip into being an unlawful inducement? Can, as the unions argue, section 145B include the situation of an employer who is otherwise committed to collective bargaining, but for economic/business reasons wishes to make adjustments to particular contractual terms derived from the collective agreement? In particular, if acceptance of a direct offer would mean that at least one term of employment will be determined by direct rather than collective

agreement, is that sufficient to amount to an unlawful inducement, even if only for a limited time and/or other terms continue to be determined collectively?

The Court of Appeal in *Kostal UK Ltd v Mr D Dunkley and Others* has set out the scope of section 145B. Finding against the union, the Court held that where workers' terms of employment are determined by collective agreement, s145B will only come into play if the employer's purpose is to achieve the result that one or more of the workers' terms of employment will no longer be determined by collective agreement **on a permanent basis**. It is not sufficient if the employer's purpose is merely to ensure that the term or terms will, on this one occasion, not be determined collectively.

A further appeal backed by the union is pending.

Strike it *Unlucky*

When a trade union calls its members out on strike it inevitably commits the common law tort of inducing breaches of their contracts, against which the employer may seek an interim injunction. However the union will have immunity if the action taken is in contemplation of a trade dispute **and** the union has complied with the statutory balloting and notification requirements, including conducting a secret postal ballot. There is an exception for de minimis balloting errors.

In *Royal Mail Group Ltd v Communication Workers Union*, the Court of Appeal has upheld the High Court's decision to grant an injunction preventing a strike by postal workers. In encouraging its members to intercept their own ballot papers at the delivery offices where they worked, the union had interfered with the ballot. Interfering with the secret ballot requirements was a clear breach and more than simply a minor breach which could be overlooked.

5. Post Termination clauses

Strictly Come *Drafting*

In July, the Supreme Court handed down its judgment in *Tillman v Egon Zehnder Ltd* upholding the Court of Appeal judgment that a restrictive covenant that prevents an ex-employee from being "interested in" a competitor for six months without an express carve-out for minor shareholdings was too wide and therefore unenforceable in its entirety.

But could the so-called blue-pencil test save the drafting day? In this case, yes as the words "or interested in" could be removed. Oh the excitement for employment lawyers glued to the Supreme Court Live broadcast! Overturning case law going back to 1920, it was held that a court can sever not only an unenforceable clause but also words from a clause, provided their removal from the clause does not generate any major change in the overall effect of the post-employment restraints in the contract.

It should be remembered that the "blue pencil" test is still a very limited life-line, a court will not re-write a clause to make it enforceable if it is too broad. Nor will it construe a wide (and void) restriction as having implied (and valid) limitations. Strictly speaking, best get the drafting right in the first place!

Also this year, *Nosworthy v Instinctif Partners Ltd* is a reminder to employees that 'bad leaver' provisions that required the employee who voluntarily resigned their employment to forfeit shares and loan notes are not unconscionable amounting to a penalty clause. The employee had accepted the provisions as part of a share sale agreement and the employer was entitled to rely on the provisions when the employee resigned.

6. Discipline

Stacey Duly Investigates

The EAT reminds employers that the role of the investigator will usually be confined to investigating the allegations and making relevant findings of fact, based on the available evidence.

In *Dronsfield v The University of Reading*, the EAT held that the removal of evaluative conclusions from a draft investigation report did not render a subsequent dismissal unfair. It was not unfair that the investigator altered his initial draft report by removing his evaluative conclusions on whether the employee's conduct amounted to misconduct as defined by the employer's rules. It was open to the investigator to accept advice from the employer's in-house solicitor that the investigation report should be restricted to factual findings and a conclusion as to whether there was a prima facie case to answer. It was for the disciplinary panel to make an evaluative judgment on whether the conduct amounted to misconduct under the employer's disciplinary rules.

Suggesting that an investigator amend their report to remove evaluative conclusions will not necessarily render any subsequent dismissal unfair. However, ensure that any advice does not overstep the mark. Where evaluative conclusions are being included in line with

an employer's policy, investigators should not be placed under pressure to alter their reports.

Suspension Watch

Is suspension of an employee pending investigation into an incident a neutral act or can it amount to a breach of the implied duty of mutual trust and confidence, entitling the employee to resign and claim constructive unfair dismissal?

In 2017, the High Court in *Agoreyo v London Borough of Lambeth* warned that "suspension was not a neutral act". However, this year the Court of Appeal has held "whether or not suspension is described as a 'neutral act' is unlikely to assist in resolving what is the crucial question". The crucial question is whether there has been a breach of the implied term of trust and confidence. That is a question of fact which requires consideration as to whether there was reasonable and proper cause for that suspension. As ever, it will be a highly fact-specific question. On the facts of this case, the Court of Appeal restored the tribunal's finding that the decision to suspend a teacher pending an internal investigation was reasonable on the facts.

Pan-or-ram-on

An employer investigating alleged misconduct which also amounts to a criminal offence will be facing a difficult situation and will need to proceed carefully. On the one hand, the employer must make its own enquiries into the alleged criminal acts so should it 'ram' on with its internal investigation? On the other hand, should disciplinary action be 'panned', putting it on hold pending the outcome of criminal proceedings? Can an employee insist disciplinary proceedings be adjourned on the basis that his response to questions could prejudice a pending trial or police interview?

In *North West Anglia NHS Foundation Trust v Dr Andrew Greg*, the Court of Appeal confirmed that an employer does not usually need to wait for the conclusion of any criminal proceedings before commencing internal disciplinary proceedings. A court would only intervene if the employee could show that the continuation of the disciplinary proceedings gives rise to a **real** danger of a miscarriage of justice in the criminal proceedings (a notional danger will not suffice).

7. Dismissal

The only way is *Exit*

Some lessons from this year's crop of unfair dismissal cases:

1. In cases for unfair dismissal as well as for religious discrimination cases, an employee will not succeed in a claim for either where they have been instructed to stop proselytizing in the course of their employment but continue to do so (*Kuteh v Dartford and Gravesham NHS Trust*).
2. Reinstatement and re-engagement orders do not impose an absolute obligation on the employer to do so. Penalty for breach is an additional award not specific performance (*Mackenzie v Chancellor, Masters and Scholars of the University of Cambridge*).
3. When responding to an employment tribunal claim it is critical to understand what you are trying to achieve. Before sitting down to complete an ET3 response form, pause for thought and consider any alternative arguments that are needed to ensure you can run your full defence (*Upton-Hansen Architects Ltd v Gyftaki*).
4. For the compensatory award for unfair dismissal to be reduced for contributory fault, the employer need only show that the claimant's conduct was culpable, blameworthy, foolish or similar. The conduct does not need to amount to gross misconduct, nor does it have to amount to a breach of contract (*Jagex Ltd v McCambridge*).

8. Privacy

Big Brother

The Grand Chamber of the European Court of Human Rights in *López Ribalda and others v Spain* provided guidance this year on the factors to be considered in the use of covert video surveillance:

1. **Notification** - has the employee been notified of the possibility of video-surveillance measures being adopted by the employer and of the implementation of such measures?
2. **Extent** - what is the extent of the surveillance by the employer and the degree of intrusion into the employee's privacy?
3. **Justified legitimate reason** - has the employer provided legitimate reasons to justify covert video-surveillance and the extent thereof?
4. **Less intrusive alternatives** - would it have been possible to set up a surveillance system based on less intrusive methods and measures?

5. **Consequences** - what are the consequences of the surveillance for the employee subjected to it?
6. **Safeguards** - had the employee been provided with appropriate safeguards, especially where the employer's surveillance operations are of an intrusive nature?

The judgment is by no means a green light to blanket surveillance, but rather confirms that use of covert video recording will not necessarily breach Article 8. Where covert monitoring is used after consideration of alternatives, it should be carried out for the shortest possible period and affect as few individuals as possible.

The Voice secretly recorded

Smart phones make covert voice recordings easy these days. The starting point is that it will generally amount to misconduct for an employee not to inform the employer that a recording is being made of a discussion, but it will not necessarily amount to gross misconduct. In *Phoenix House Ltd v Stockman*, the EAT advises that whether making a secret recording will amount to a breach of the implied term of trust and confidence will depend on:

1. **what is recorded** - is it confidential information?
2. **the purpose of the recording** - entrapment or simply to assist recall?
3. **extent of the employee's blameworthiness** - is the recording made in defiance of an instruction not to do so or has the employee lied about making a recording?
4. **any evidence of the attitude of the employer to such conduct** - what does the disciplinary policy say? Does it address the issue?

In light of the last factor, employers may like to review their disciplinary policies and add covert recording at any time as an example of gross misconduct (if it is not already there). Please note this judgment did not address the privacy or data protection rights of those recorded without their consent.

9. Data Protection

First Dates

On the data protection front:

1. We now have updated guidance on response times for responding to data subject

access requests (DSARs). Previously the one month time limit ran from the day after the DSAR was received. Now, the one month limit is calculated from the date the DSAR is **received**.

2. The Hellenic Data Protection Authority (Greece) fined an employer €150,000 for incorrectly relying on 'consent' to process employee data under the EU General Data Protection Regulation (GDPR). An early warning to all European employers. In the context of employment relations, 'consent' is unlikely to be a valid lawful basis for processing data in light of the imbalance of power. Even though an employer may have another valid reason under the GDPR for processing employees' information, telling employees you are relying on another incorrect basis will be a breach risking a significant fine from the relevant supervisory authority.

10. Legal privilege

Don't tell the *Judge*

Legal advice privilege (LAP) protects confidential communications between client and lawyer, made for the dominant purpose of seeking or giving legal advice. If LAP applies the document is not admissible in evidence before a tribunal or court. However, LAP protection is not absolute.

This year we are reminded that any exception to the legal advice principle is only permitted in exceptional circumstances.

Under the "iniquity principle" LAP is lost where a communication or document comes into being for the purpose of furthering a criminal or fraudulent design. In *Curless v Shell International Ltd* (previously known as *X v Y Ltd*) a dispute arose regarding an email containing legal advice on the possibility of dismissing under a genuine redundancy exercise, an underperforming employee who had previously brought a disability discrimination claim. Was the email protected under LAP or did it fall foul of the iniquity principle as "cloaking discrimination"?

The Court of Appeal disagreed with the EAT's interpretation that the legal advice provided was done in an underhand way cloaking a discriminatory dismissal as a redundancy or in an iniquitous way (cloaking criminal or fraudulent action). It merely set out the type of advice lawyers give out "day in day out". The iniquity principle was not engaged.

Grand Designs *go awry*

Kasongo v Humanscale UK Ltd reminds us of the dangers of selective waiver of LAP. It is open to a party to voluntarily disclose and waive privilege it has in a document to support its case. But be warned, where privilege is voluntarily waived in a document, this may subsequently give rise to claims of implied collateral waiver of privilege in other related documents that are part of the same transaction.

Effectively the law prohibits a party from 'cherry-picking' which privileged documents to disclose to prevent the court/and or its opponent from being given only a partial picture where that may cause unfairness or misunderstanding. In this case, the employer who disclosed a partially redacted legal advice note was held to have also disclosed the redacted parts.

Also this year, the Court of Appeal in BGC Brokers LLP and others v Tradition (UK) Ltd and others reminds us that once a settlement has been reached, the terms of the settlement itself will not usually be privileged. If you incorporate earlier without prejudice privileged communications in your settlement agreement, so that you can sue on any commitments made in the agreement relating to those communications, they will lose their without prejudice privileged status. In this case, it meant an otherwise privileged email between the employer and one of five defendants became disclosable to the remaining four defendants.

11. Working Time

Ex-tra pay on the Beach

Just when you think surely there cannot be any more highly significant overtime and calculating holiday pay cases left out there, another three come along!

1. In East of England Ambulance Service NHS Trust v Flowers, the Court of Appeal has once again confirmed that when calculating holiday pay for the first four weeks of holiday entitlement 'normal pay' is that which is 'normally received'. Focusing on whether overtime is or isn't "voluntary" is irrelevant. The key is regular receipt. It will be for tribunals to determine, on a case-by-case basis, whether a particular pattern of voluntary overtime is sufficiently regular and settled. But also remember to check the contractual provisions to see if there is a contractual right to have overtime included in which case there may not be a need to establish a regular pattern.

So far so good.

2. We then heard from the Northern Irish Court of Appeal (NICA) in Chief Constable of the Police Service of Northern Ireland and another v Agnew and others. In a surprise judgment, the NICA challenges the perceived wisdom on holiday underpayment back pay claims.

The NICA held that the Working Time Regulations (Northern Ireland) (identical relevant provisions to the Working Time Regulations) must be construed as allowing claims for underpayments for holiday pay that were part of a series of underpayments. It also rejected the 2015 judgment of the EAT in Bear Scotland Ltd v Fulton and other cases. The NICA held that a series is not ended as a matter of law by a gap of more than three months between unlawful deductions related to holiday pay. A series based on a common fault of paying basic pay as holiday pay regardless of any overtime or allowances is not ended by a lawful payment which comes about simply because on that occasion there was no overtime or allowance that needed to be taken into account.

Judgments of the NICA are not binding on the tribunals and courts in Great Britain, nevertheless they can have strong persuasive value. Back pay claims going back several years appears to be potentially back on the table pending a further appeal to the Supreme Court.

3. And then we had the Court of Appeal judgment in Brazel v The Harpur Trust (UNISON intervening). While the pro-rata principle for holiday entitlement and related pay applies in the case of full-year part-time workers, it does not apply in the case of part-year workers such as term-time only teachers. As such, term time only workers are entitled to 5.6 weeks holiday based on their weekly work pattern during the term. Also, the express provisions for calculating holiday pay for workers with variable hours contained in the Working Time Regulations 1998 (WTR) cannot be overridden by capping annual holiday pay at 12.07% of annualised hours for ease of calculation. The calculation set out in the WTR must be used even where it results in part-year workers receiving a higher proportion of their annual earnings as holiday pay. Unsurprisingly this case is also on appeal.

Holiday entitlement and pay will continue to be a hot topic for some time yet!

The Great British *Break Off*

As well as the usual plethora of holiday pay cases, 2019 also saw some notable rest break judgments from which we have learned:

1. Personal injury damages are potentially recoverable for failure to provide rest breaks where the claimant has suffered more than a minor inconvenience as a result of a medical condition (*Grange v Abellio London Ltd*).
2. Compensatory rest need not be an uninterrupted 20-minute break (*Network Rail Infrastructure Ltd v Crawford*).

The Great British *Break Off*: an extra slice

In *Federación de Servicios de Comisiones Obreras (CCOO)*, the Court of Justice of the European Union (CJEU) held that under the Working Time Directive (WTD), Member States "must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured" to ensure minimum daily and weekly rest breaks are observed.

Regulation 9 of the [WTR](#) requires employers to keep "adequate records" to show whether certain, but not all of the limits and requirements specified in the [WTR](#), are complied with. It does not specifically require records to be kept of daily or weekly rest or of the hours worked each day for every worker. As such, the [WTR](#) do not go far enough to meet the more onerous extra record-keeping requirements now held to be required by the [CJEU](#).

12. Family Friendly

Pay Sync Battle

Where employers offer enhanced contractual maternity pay to mothers, can they only offer statutory shared parental leave (ShPL) pay to fathers? Does a failure to match contractual enhancement for fathers taking [ShPL](#) amount to direct or indirect sex discrimination?

These questions have been the baby elephant in the nursery for some time. This year, the Court of Appeal in the combined cases of *Ali v Capita Customer Management Ltd* and *Chief Constable of Leicestershire Police v Hextall* has emphatically held that employers who pay enhanced contractual maternity pay but only statutory [ShPL](#) pay do NOT directly or indirectly discriminate against men and are not in breach of equality of terms (equal

pay) legislation.

At the centre of this highly significant judgment is the Court of Appeal's conclusion that birth mothers on maternity leave are in materially different circumstances to men (or women) on ShPL, and that this distinction does not simply expire at the end of the two week compulsory maternity leave period.

Unsurprisingly, a further appeal is pending before the Supreme Court.

Who Dare Wins

Employees on maternity leave are not exempt from being dismissed or selected for redundancy in a genuine redundancy situation where there is no suitable alternative vacancy. Once the dismissal takes effect, the maternity leave period automatically comes to an end. However, the right to receive statutory maternity pay (SMP) survives termination of the contract. Provided the employee fulfils the conditions for payment of SMP, she will be entitled to receive SMP regardless of her departure for any reason, including resignation, misconduct and redundancy.

This year the First Tier Tax Tribunal in *NVCS Ltd v (1) Commissioners for HMRC (2) Dare* remind employers that it is not possible to enter into a binding agreement in 'full and final settlement' of a claim for SMP even under the auspices of ACAS unless the employer has actually paid the employee her entitlement to SMP in full.

13. Equal Pay

Supermarket Sweep

Large-scale equal pay claims traditionally the reserve of public-sector workers, is now a regular feature in the grocery sector. Most of the large supermarkets are in the grips of large-scale equal pay claims with predominantly female retail shop floor employees seeking to compare themselves with a predominantly male distribution depot employees.

Under section 79 of the Equality Act 2010, an equal pay comparison is only valid between the claimant and her chosen comparator if they are both employed by the same employer and work at the same establishment or if they are both employed by the same employer and work at different establishments but 'common terms apply at the establishments'.

Can private employers avoid equal pay claims through corporate structures that physically

separate female-dominated and male-dominated workforces? In the high-profile Asda litigation (*Brierley v Asda Stores Ltd*), the Court of Appeal has held early this year that common terms can apply as between two separate establishments (a store and a depot) not only where they apply to actual employees in the relevant classes working there but also where they would apply, even if the claimant's class of employee would never in practice be employed at the comparator's establishment (and vice versa). For example, an in-store baker would be paid the same even if she was hypothetically employed as a baker based at a distribution depot (it doesn't matter that you would never have a baker based at a depot). For both the retail staff and the distribution staff, Asda applied common terms and conditions wherever they worked and so the female retail staff can compare themselves with the male distribution staff. In addition, the fact that the Asda Executive Board was ultimately responsible for pay across the two groups also satisfied the "single source" test under EU law.

A further appeal to the Supreme Court on this preliminary issue is due to be heard next July, ensuring that these equal pay claims will rumble on for some time yet.

14. Harassment

Under(*third party*)cover Boss

Over the summer, the Government ran a consultation on harassment. The consultation primarily focused on sexual harassment, but equally applied to harassment related to age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation. The proposals include:

- introducing a duty to prevent harassment in the workplace and a revised Statutory Code of Practice;
- re-introducing explicit protections against third party harassment;
- extending protection to interns and volunteers; and
- extending time limits for bringing a tribunal claim.

While we await the outcome of the Consultation with new proposals for protections against third party harassment, it is still open to an employee to argue that under section 26 (harassment), an employer's failure to act in relation to third party harassment itself may amount to unwanted conduct (harassment can be committed by inaction as well as action).

This year the EAT reminds us that an employer will only be liable for its action or inaction

related to third-party harassment of an employee where the employer's action or inaction is itself because of the relevant protected characteristic (Bessong v Pennine Care NHS Foundation Trust).

15. Discrimination

The *Coffey Maze*

This year we received the important Court of Appeal guidance on 'perceived' discrimination and 'progressive conditions'.

Is the concept of direct discrimination under the Equality Act 2010 wide enough to encompass perceived disability discrimination? Yes. In the first Court of Appeal judgment on the question of 'perceived disability', Chief Constable of Norfolk v Coffey, the Court has confirmed that claims based on a perception of disability are permissible. The starting point is whether or not the employer perceived the employee to have an impairment that has "all the features of the protected characteristic". There is no need for the employer to conclude that the employee meets the legal definition of having a disability.

But what if an employer does not perceive the employee to have a disability now but instead perceives that the employee has a condition which is likely to progress into a disability? Does the Equality Act only cover those wrongly perceived to be currently disabled or does it also extend to those who an employer perceives will meet the definition of disability at some point in the future? The Court held that as perceived disability is protected under the Equality Act, if a person is perceived to have a progressive condition (under schedule 1 to the Equality Act), they are also covered.

In addition, the Court of Appeal also confirmed that the phrase "normal day-to-day activities" does indeed include normal activities which may arise only at work.

Spitting *Material Image*

Where a claimant in a direct discrimination claim seeks to compare themselves to an actual comparator, it is not necessary for the decision-maker in the comparator's case to be the same person who decided the claimant's case. An employer may be liable for discriminatory treatment meted out to different employees in similar circumstances even though different individual decision-makers were involved. There may be cases where the difference in the decision-maker amounts to a material difference. For example, where

one decision-maker was operating under a different policy from the other, or where one decision-maker is operating at a significantly different level from the other. However, if the only difference is the identity of the decision-maker that would be unlikely to amount to a material difference because the employer would be liable for the actions and decisions of both decision-makers (*Olalekan v Serco Ltd*).

The Frosty *Medical* Report

In *Owen v AMEC Foster Wheeler Energy Ltd and anor*, the Court of Appeal held that refusing to allow a disabled employee to undertake an overseas posting due to medical concerns did not amount to direct disability discrimination. The Court of Appeal agreed that there was no direct discrimination as a hypothetical comparator with a similar medical risk would have been treated in exactly the same way, even if they did not have the claimant's particular disabilities.

Of note, the Court of Appeal rejected arguments that the medical report was a proxy for his disabilities and therefore a case of direct discrimination as the medical report was indissociable from his disabilities. The Court held that the concept of indissociability does not readily translate to the context of disability discrimination. The concept of disability is not a binary one. It is not the case that a person's health is always entirely irrelevant to his or her ability to do a job.

In this case, the Court also found that due to the claimant's multiple medical conditions, a medical assessment was necessary and there was no reasonable adjustment that the employer could have made.

The *Weakish* Link

'Discrimination arising from a disability' under section 15 Equality Act 2010 entails two distinct causative issues: The first involves examining the employer's state of mind: did the unfavourable treatment occur because of the employer's attitude to the relevant 'something'? The second is objective: is there a causal link between the disability and the 'something'?

In 2018 we had two important judgments revealing that the concept of 'something arising in consequence of disability' entails a 'looser connection' than strict causation. While claimants benefit from a rather loose causation test, the EAT this year reminds us that

there must still be a connection between the disability and the 'something' that led to the unfavourable treatment (IForce Ltd v Wood).

Mastermind

In the context of a discrimination arising from disability claim, when considering whether the employer had knowledge (actual or constructive) of the claimant's disability, it is relevant to consider what the employer knew or ought to have known right up to the point at which it decides the outcome of any appeal (Baldeh v Churches Housing Association of Dudley and District Ltd).

Only Connect *to company policy*

In Linsley v Commissioners for Her Majesty's Revenue and Customs, the EAT points out that if an employer's own policy recommends a particular step, the employment tribunal is entitled to infer that the employer considers it to be practicable. In other words, a company policy is a factor which should be given significant weight in assessing the reasonableness of the adjustment, regardless of whether the policy gives rise to any contractual right.

The Real Housewives of *Hendon*

An employer (or individuals within an employer) acting because of their own religion or belief does not of itself entitle an employee to claim direct discrimination on grounds of religion or belief. In Gan Menachem Hendon Ltd v De Groen, a nursery teacher was dismissed by an ultra-orthodox Jewish nursery school for cohabiting with her partner and refusing to lie about it to parents. While she succeeded in her sex discrimination and harassment claims, her religious discrimination claim failed as the individuals within an employer acted because of their own belief rather than the belief of the claimant.

Good Morning Britain

A Christian magistrate, did not suffer victimisation when he was removed from office after expressing his disapproval about same-sex adoptions on national morning television. The EAT held that his remarks would lead a reasonable person to conclude that he would

always decide a particular type of case in a specific way irrespective of the evidence or the law. This suggested he was prepared to flout his judicial oath of impartiality and this in turn could bring the judiciary into disrepute (Page v Lord Chancellor/Secretary of State for Justice and another). In his related case, the EAT also agreed that an NHS Trust did not discriminate against him on religious grounds in his position as a non-executive director after it decided not to renew his term. There was no direct discrimination because he was removed for repeatedly speaking to the media without first informing the Trust, despite repeated requests to seek permission, and not because of his religious belief (Page v NHS Trust Development Authority).

Made *for* Chelsea

The Court of Appeal has held that an employee who was dismissed for refusing to sign an agreement that would assign copyright over any works created during her employment to the employer was not indirectly discriminated against on the ground of a 'philosophical belief' in 'the statutory human or moral right to own the copyright and moral rights of her own creative works and output'.

The Court considered that, on the facts, the asserted belief did not put the employee at a disadvantage - she refused to sign the agreement because she was concerned that it leaned too far towards the employer or failed to protect her financial interests, and so there was no causal link between the belief and the dismissal. There was therefore no need to consider whether the belief was capable of being protected as a 'philosophical belief' under the Equality Act 2010 (Gray v Mulberry Company (Design) Ltd).

The 2019 awards (drum roll please...)

The 'Best Case Name' Award

and the winner is... *Mr Spaceman v ISS*

OK the full name is Mr Spaceman v ISS Mediclean Ltd, but to the writer ISS will always mean 'International Space Station'!

The 'Fashionista' Award

and the winner is... Lady Hale's Spider

The brooch worn by Lady Hale when handing down the Supreme Court historic judgment on the prorogation of Parliament which became an internet fashion sensation!

The 'Oops' Award

and the winner is... Humanscale UK Ltd

If you are providing a redacted copy of a document in any context, simply crossing out words with a black marker does not work!

The 'Red Faced' Award

and the winner is... The Diversity Trainer at Pobl Group Ltd

In *Georges v Pobl Group Ltd* a tribunal held that a diversity trainer encouraging staff to use offensive terms during a diversity training exercise itself amounted to racial harassment.

The 'Nice Try' Award

and the winner is... Mr Kocur

For taking his case in *Kocur v Angard Staffing Solutions Ltd* and anor all the way to the Court of Appeal to argue the Agency Workers Regulations 2010 conferred a right for agency workers to the full-time hours of work of his chosen comparator!

Rejecting his claim, the Agency Workers Regulations (AWR) do not entitle an agency worker to the same number of contractual hours as a directly-recruited comparator. Parity on 'duration of working time' refers to terms that set a maximum duration of working time. To hold otherwise would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time.

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